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Nos. 106 & 2

Br. of Atty. Gen. (Clerk) for Appellee.

Filed Feb. 23, 1901.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. CHAMPION, APPELLANT,
v.
JOHN C. AMES, UNITED STATES MARSHAL. } No. 106.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLEE.

JAMES M. BECK,
Assistant Attorney-General.

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BRIEF OF APPELLEE.

STATEMENT.

This is an appeal by the appellant from an order of the circuit court, discharging an application, previously made by the appellant, for a writ of habeas corpus, and remanding him to the custody of the United States Marshal for the northern district of Illinois. The appellant had been committed on June 22, 1899, by a United States commissioner in default of bail to answer an indictment then pending against him in the district court of the United States for the northern district of Texas, under a complaint dated May 9, 1899, which charged the appellant and one Charles B. Park with conspiring to commit an offense against the United States, to wit, did cause to be carried from the State of Texas

to other *States*, by express, lottery tickets and advertisements of a lottery, in violation of the act of Congress passed March 2, 1895. The complaint will be found on folio pages 14 to 26, inclusive, of the record. It avers, in substance, that the said Charles F. Champion (the appellant), W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance, etc. The overt act is thereupon charged as follows:

> And the said complainant aforesaid on his oath aforesaid does further state that, in pursuance of said conspiracy and to effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon the event of a lottery, to wit, the Pan-American Lottery Company, offering prizes dependent upon lot and chance, as afore-

said, as they then and there well knew, said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county of Dallas aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, *deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire,* one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is attached to and made a part of page three of Exhibit A, hereto attached, and the other said whole ticket being like the one aforesaid attached to Exhibit A in all particulars except that it differs in numbers * * * and said box so containing the said certificates or tickets being addressed and consigned by the said C. F. Champion alias W. W. Ogden, W. F. Champion, and Charles B. Park to James A. Ward, Fresno, California, which was so addressed and so deposited with the said express company for the purpose of being carried from Dallas, in the State of Texas, to Fresno, in the State of California, and there delivered to James A. Ward for

> the purpose of disposing of said above-mentioned lottery tickets, and which said tickets—wholes, halves, quarters, and eight[h]s—purported upon their face to entitle the holder thereof to so much of such prize of thirty-two thousand dollars as the denomination of such tickets might be entitled to in the event the number upon such ticket at said drawing, which purported to take place on Wednesday, March 15, 1899, should be allotted the prize, or any part thereof, according to lot or chance, the peculiar and particular manner of which is to this complainant unknown, all of which the said C. F. Champion alias W. W. Ogden, W. F. Champion, and Charles B. Park then and there well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Hearing was had on this complaint, and among other testimony a certified copy of an indictment which had been found against the defendant in the district court of the United States for the northern district of Illinois was offered in evidence, and the identity of the appellant with the defendant named in this indictment was duly proved to the satisfaction of the commissioner.

The indictment will be found in the transcript of record from folio pages 26 to 53, inclusive. It also charges as an overt act of the alleged conspiracy that the said Champion did, "for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, *deposit and cause to be deposited and shipped and*

carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof, for the reason that the same has much printed matter that is improper and too lengthy to set out in this indictment accurately, and for that reason the tickets (*sic*) is annexed hereto in its entirety."

Among the testimony offered before the United States commissioner was the lottery matter, which, it was charged in the original indictment, had been transported contrary to law. It consisted of tickets, advertisements, circular letters, official drawings, and other matter, showing the nature of the lottery and the manner in which it was conducted. The ticket, which will be found on page 71 of the record, and which may be taken as a sample, provides as follows:

PAN-AMERICAN LOTTERY COMPANY.

CAPITAL PRIZE $32,000.

This WHOLE Ticket entitles the holder thereof to the WHOLE of such prize as may be drawn by its number in the within named drawing if presented before the expiration of three months from the date of said drawing.

Under the last-mentioned complaint the testimony was taken by the United States commissioner, and, as

he certifies, he was satisfied "that the laws of the United States have been violated as charged in the complaint, and that there is probable cause shown to believe the defendant guilty of alleged offense." He was therefore ordered to give bond in the sum of $1,000 for his appearance before the United States district court of the northern district of Texas to answer said charge, "and that in default of same he stand committed." Whereupon the appellant filed an application for habeas corpus, which the circuit judge, on June 27, 1899, denied; whereupon this appeal was taken.

The record thus presents a single question, and that is the constitutionality of section 1 of the act of March 2, 1895. It is not questioned that sufficient testimony was offered to justify the commissioner in committing the defendant to await an order of removal if the act of Congress referred to be a constitutional exercise of power. Nor is it questioned that the acts complained of are within the meaning of the said act of Congress. (See appellant's brief filed by Moritz Rosenthal, esq., and Joseph B. David, esq., page 3.)

ARGUMENT.

I. HISTORY OF THE ACT OF MARCH 2, 1895.

Before passing to a discussion of the cases, it is desirable to review the history of the act of Congress under which appellant was arrested and indicted, in order that it may be clearly seen that its purpose was to prohibit such instrumentalities of commerce as express and railroad companies from transporting lottery matter.

The attempt of Congress to legislate lotteries out of existence had its commencement in the act of July 27, 1868 (15 Stat., 196), which provided, section 13, "that it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." This act provided no penalty, and Congress, on June 8, 1872 (17 Stat., 302), provided, section 149, "that it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning *illegal* lotteries, so-called gift concerts, or other similar enterprises offering prizes," etc., and added a penalty for its violation.

Subsequently, by act approved July 12, 1876 (19 Stat., 90), the word "illegal" was stricken from the section, and the act of June 8, 1872, as thus amended, became section 3894 of the Revised Statutes.

The constitutionality of this act was passed upon in the case of *Ex parte Jackson* (96 U. S., 727), in a case where a letter referring to a lottery was deposited in the southern district of New York for conveyance to the town of Gloversville in the same State. The constitutionality of such legislation was challenged, on the ground that to exclude such matter from the mails was a violation of the freedom of the press. The constitutionality of the act was sustained under the authority of Congress "to establish post-offices and post-roads," and to exclude therefrom any matter deemed injurious to public morals.

By act of April 29, 1878 (20 Stat., 39), it was made illegal to conduct a lottery within the District of Columbia.

In the judgment of Congress this legislation had proved ineffectual, as many lotteries, notably the great Louisiana Lottery, were conducting extensive operations throughout the country. Deeming such legislation inimical to legitimate commerce, an act of Congress was approved September 19, 1890 (26 Stat., 465), which materially extended Revised Statutes 3894 by excluding all matter which in any manner related to the conduct of a lottery from the mails, and which authorized the Postmaster-General to return registered mail matter relating to lotteries to the writers thereof, and to refuse payment of money orders which were given in payment of chances in such lotteries. This act to a very great extent excluded the mail matter of American lottery companies from the mails, but large quantities

of such matter continued to be imported as merchandise from lottery companies in other countries, and accordingly Congress, by the act of August 27, 1894, the Wilson tariff act (28 Stat., 509), provided by section 10 "that all persons are prohibited from importing into the United States from any foreign country * * * any lottery ticket or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law." To further enforce this act, sections 11 and 12 provided for the punishment of any officer, agent, or employee of the Government who shall knowingly aid or abet any person in the violation of section 10, and also for the seizure, condemnation, and destruction of the objectionable and unlawful matter.

Even this stringent legislation still proved ineffectual, notwithstanding the fact that it was supplemented by statutes of the various States, which prohibited the conduct of any lottery within their borders. The lottery companies, notably those having their home office in other countries, continued clandestinely to smuggle their lottery matter into the United States, and, as the mails were closed to them, they continued to ship as merchandise their matter through the various States by means of express companies and other common carriers of freight. It was this continued defiance of the law which led Congress to pass the act of March 2, 1895 (28 Stat., 963), and the title of the act, read in

connection with its legislative history and previous legislation, clearly shows that its principal purpose was to prohibit the conveyance of such illegal and injurious matter by means of express companies or other known instrumentalities of commerce which are engaged in interstate transportation. The material portions of the act are as follows:

> CHAP. 191.—AN ACT For the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only.

When this bill was before the Senate (see Congressional Record, Fifty-third Congress, second session, vol. 26, part 5, p. 4986) Senator Hoar, who had charge of the bill, said in explanation of its purposes:

> That includes every possible way in which such matters can be carried. It includes express; it includes all private means of transportation, and it also includes public methods of transportation. If the words the Senator from Kansas suggests are put in the bill, which are in effect, by any private instrumentality whatever, then he has not provided for punishing the offender if he violates the statute through a public instrumentality. So the Senator's amendment would narrow and not extend the provisions of the bill which now comprehend every possible method. The bill only enumerates the mail where it declares the mere depositing of such matter in the mails to be a felony; but the transportation clause is full and clear. I hope the Senator from Kansas will not press his amendment.

When the bill reached the House (Cong. Rec., vol. 27, p. 3013) Mr. Broderick, who had the bill in charge, made the following statement as to its purposes:

> Mr. BRODERICK. Mr. Speaker, in 1890 Congress forbade the use of the United States mails to companies and individuals for the purpose of advertising lottery schemes. That law has been evaded by using for such purposes the express, and it has been deemed necessary to amend the law so as to prohibit carrying in any way matter intended to advertise lotteries. That is the purpose of this bill.

II. JUDICIAL CONSTRUCTION.

Before passing to a discussion of the constitutionality of the act of 1895, it may be desirable to briefly review the decisions of this court and the circuit court of appeals as to the previous legislation.

The acts of Congress excluding lottery matter from the mails have been under discussion in *Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110, and *Horner* v. *United States*, No. 1, 143 U. S., 207.

In none of these cases did the question of the right to exclude lottery matter from interstate traffic under the interstate-commerce clause of the Constitution arise. All of them were cases where the United States mails, a purely governmental agency, were used as a means of conveyance, and the constitutionality of the acts was sustained on the ground that the right to establish post-offices and post-roads included the right on the part of Congress to designate what should and what should not be carried by this governmental agency. It is true that Mr. Justice Field, in *Ex parte* Jackson, did question the power of Congress to prevent the transportation as merchandise of matter which it excludes from the mails. But, apart from the fact that this expression of a doubt was purely *obiter*, and in no respect necessary to the facts of the case, it must be further remarked that it was predicated upon a case where the conveyance of the unlawful matter was purely within the borders of a State. No reference was made in the arguments and none in the opinions of the court, either in *Ex parte* Jackson or the subse-

quent cases, to the interstate-commerce clause of the Constitution, and these cases, therefore, can not be regarded as authority in the present case, except to the extent that they affirm the right of Congress to exclude matter which, in its discretion, is injurious to the public morals, and such exclusion does not abridge the freedom of the press.

The question involved in the present contention has only arisen in two cases.

In the case *France* v. *United States* (164 U. S., 676), the plaintiffs in error had been convicted under the act of March 2, 1895, for carrying certain books and papers, which showed the drawings of a lottery, which drawings had previously been made, from Covington, Ky., to Cincinnati, in the State of Ohio. Upon conviction, the defendant sued out a writ of error. This court held that the conviction could not be sustained, as the matter which the defendant transported from State to State had reference to a lottery which had already been drawn, and that the true meaning of the act was that only such matter was forbidden as related to a lottery which was to be drawn in the future. This court therefore found it unnecessary, and declined to decide the question as to the constitutionality of the act of March 2, 1895, or to intimate any opinion with respect thereto.

The only case which directly decides the question at bar is the case of *Charles W. Reilley, John Francis, Anthony Hoff, and John Edgar* v. *The United States*, decided February 12, 1901, by the Circuit Court of Appeals for the sixth circuit, and not yet reported. In

that case the plaintiffs in error were convicted in the district court for the southern district of Ohio for conspiring to violate the provisions of the act of March 2, 1895. It was shown that the defendants were acting together in what was known as the "policy" business in Cincinnati and surrounding communities, including Newport, Ky. The headquarters of the business were at Cincinnati, Ohio, and were conducted by Reilley. Edgar was a carrier for Reilley, and in the course of the business crossed from Cincinnati, Ohio, to Newport, Ky., and the policy tickets were found in his possession. Hoff wrote the policy ticket, and Francis had participated in the conspiracy to the extent that, after the drawings had been made, he had gone to the office of the Western Union Telegraph Company and telegraphed in cipher to various agencies in other States the reports of the drawing. After conviction the defendants sued out a writ of error, and contended in the appellate court that the act of March 2, 1895, was unconstitutional. The Circuit Court of Appeals, however, affirmed the constitutionality of the act and sustained the conviction in an opinion which is printed as part of appendix. (See *infra*, page 65.)

The only authority upon the precise question, therefore, sustained the contention of the Government. The correctness of this decision is now *challenged*. The importance of the question thus involved can not be readily overestimated, for, apart from the immense importance to the Government of excluding from the channels of interstate traffic matter which Congress

deems to be demoralizing to the commercial interests of the United States, the question involves the length and breadth of the commercial power of the Union, a power without which the Republic would not have come into existence, or continue to be. There are numerous decisions as to that which States may not do in regulating interstate commerce, but there are few decisions which define the power of Congress to regulate commerce with foreign countries and between the States. The length and breadth of this power seems to be involved to some extent in the present discussion, and this would seem to justify a full discussion of a question of such great importance.

I shall argue in favor of the constitutionality of the act on three grounds:

(1) That lottery tickets and shares are articles of commerce within the meaning of paragraph 3, section 8, Article I of the Constitution.

(2) That as express companies, when engaged in interstate traffic, are known instrumentalities of commerce, such express companies can be forbidden from transporting lottery matter from State to State.

(3) That even if lottery tickets be not articles of commerce, yet, if Congress was of opinion that their importation into this country, or their purchase and sale between citizens of the various States and transportation from State to State, was injurious to interstate commerce, the power to regulate such legitimate interstate commerce includes the power to suppress, when interstate, the traffic in lottery matter, which, even if it

be not interstate commerce, is yet detrimental to such commerce, and such an act of Congress would be constitutional.

III. LOTTERY SHARES ARTICLES OF COMMERCE.

Lottery tickets are articles of commerce within the meaning of paragraph 3, section 8, Article I, of the Constitution.

In construing this important clause of the Constitution it is necessary to determine what was in the minds of its framers. Did they regard lottery tickets as articles of commerce? If they did such articles are necessarily included within the interstate-commerce clause of the Constitution when conveyed from State to State or imported from a foreign country. The present attitude of the public mind with respect to lotteries must not be confused with that which prevailed at the time the Constitution was adopted. Under the force of various prohibitive statutes lottery shares have ceased to a very large extent to be a commodity which is bought and sold in this country, although, as the facts in the present case show us, they are still the subject of purchase and sale and conveyance. Whatever may be the comparative disuse of lotteries in this country—and it has only been within the last ten years that the purchase and sale of lottery tickets have ceased to be frequent, and then only by virtue of sternly repressive legislation by both the States and the nation—it is a matter of common knowledge that, even at this day, lottery tickets are the subjects of purchase and sale in nearly all the countries of the world, and have received the legal sanction of many civilized

governments. Nearly all the countries of the Latin races use lotteries, not only as a means of diversion, but as a means whereby the inequalities of life are occasionally equalized by the drawing of lots. The recent International Exposition at Paris, which fittingly closed the nineteenth century, was, in part, built by a national lottery, which was sanctioned by the French Government, and the same Government has repeatedly authorized lotteries for the purpose of raising funds to construct the Panama Canal. The fact that our country and the various States have seen fit to make that illegal which was before legal can not in any way affect the character of lottery tickets as articles which have been for centuries the subject of purchase and sale. Whether an article is or is not an article of commerce is dependent, not upon the question of its noxiousness or usefulness, nor upon the question whether the States have prohibited it within their borders in the exercise of their police power, but upon the fact as to whether such articles have been, in the ordinary and usual channels of trade, the subjects of purchase and sale. It is not a question of opinion as to its utility or morality. It is a question of fact. Any article that men buy or sell is an article of commerce, and as such within the power of Congress when its exchange is interstate in its character. A State has the right under the reserved police power to protect its citizens against injury or fraudulent sales, even by excluding articles of commerce. High explosives or unwholesome articles of food are articles

of commerce, but as their introduction into a State may endanger the lives and comfort of the citizens, the method of such introduction may be regulated by State legislation, where such legislation is plainly within the legitimate ends of the police power. But such regulation does not make the article less an article of commerce. The introduction of dynamite may be regulated to an extent which is practically exclusive, but dynamite is none the less an article of commerce. Putrid meat is an article of commerce. It is bought and sold as a fertilizer or as a material for soap. It is not, however, fit for food, and any State legislation regulating its introduction into the State, while valid as an exercise of the police power, can not make it less an article of commerce. It is true that this court has at times spoken of such articles as not articles of commerce, but it only meant by such expressions to mean that such articles, which endanger the lives and comfort of citizens, have no commercial rights superior to the police power of the State. The only test as to whether a given article is an article of commerce, is whether it is, or has been, customarily the subject of purchase and sale, and this must be determined by considering whether such an article is recognized as a subject of purchase and sale by the commercial world.

> That ardent spirits, etc., distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws

> of Congress and the decisions of the courts, it is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? * * *
>
> Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of inter-State commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. (*Leisy* v. *Hardin*, 135 U. S., 100.)

The question therefore occurs whether lottery tickets have been, or are, commodities which are ordinarily bought and sold in the commercial world. It was said in the case of *Schollenberger* v. *Pennsylvania* (171 U. S., 1, 7, and 8):

> In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must necessarily determine the *question* with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

It is a fact of common notoriety that, from the beginning of the Republic to the present day, lottery tickets have been the subject of universal purchase and sale in this and all civilized countries. If further proof is needed than our common knowledge, the statutes of the United States and the decisions of the courts afford ample corroboration of this fact. Indeed, the very legislation which the court is now considering seems to be proof that the purchase and sale of lottery tickets—which are *mala prohibita* and not *mala in se*—had become so extensive as to be demoralizing to legitimate business and public morals and to call for sternly repressive legislation. As such purchase and sale are not intrinsically wrong, and as governments should not restrain the right to buy and sell, except upon grave cause, it is to be assumed that the legislation which is upon the statute books of every State, and upon the statute books of the Government, would not exist had not the buying and selling of lottery tickets reached proportions which make such barter and sale an evil of great magnitude.

It is also a fair inference that the legislation which prevailed both in State and nation in the last century and at the beginning of the present, and which almost uniformly authorized such lotteries for all purposes, public and private, *religious, political, and philanthropic*, carries with it a recognition that at that time lottery tickets were recognized as a proper and legitimate subject of purchase and sale. To the Fathers who framed the Constitution the purchase of lottery tickets was a matter of everyday occurrence and

carried with it no moral reflection whatever. Such lotteries were conducted by distinguished officials, authorized by laws, and sanctified even to sacred uses, for it is a matter of common knowledge that not merely public works, such as canals, bridges, public buildings, and schoolhouses, but also churches were built by means of lotteries. For example, the steeple of Christ Church in Philadelphia was built by a lottery in which pulpit and pew were alike engaged. Thus the first American Congress provided (see 2 Stat., 726) that the corporation of the city of Washington shall have full power to authorize the drawing of lotteries for effecting any important improvement in the city which the ordinary funds or revenue thereof will not accomplish: provided, that the object for which the money is intended to be raised is first submitted to the President of the United States and shall be approved by him. Under this act of Congress ten successive lotteries were annually held by the Government from 1812 to 1821, and in all of them the President of the United States was a participant to the extent that the purposes for which the money was thus raised were submitted to and approved by him. It is a great mistake to suppose that a lottery ticket conveyed no right of action or property interest. Whatever *is the present* effect upon such commercial commodities of restrictive legislation, they formerly conveyed unquestioned property rights which could be enforced in courts of law. Thus, in *Clark* v. *The Mayor of the City of Washington* (12 Wheat., 40), one Clark, who had purchased a lottery ticket in one of the lotteries

provided by the act of Congress already cited, sued the mayor of the city of Washington in his official capacity for the amount of the prize which his ticket had drawn. In 1818 the corporation of the city of Washington had sold the right to draw the lottery to one David Gillespie, who, in turn, issued the ticket to the plaintiff, Clark, and upon the failure of Gillespie to pay Clark the amount of the prize, the question arose as to whether the city of Washington was responsible. It was held, in an opinion of Chief Justice Marshall, that the city was responsible. In the course of his opinion the learned Chief Justice refers to the management of the lottery as "a trust, and an important trust." He adds:

> Had the managers, instead of selling the whole scheme in mass, sold the tickets in the usual manner, and received the purchase-money of the several tickets, instead of a sum in gross, for the use of the city, this question could not have arisen. No person would have denied the liability of the corporation.

In 1776 the young Republic attempted to raise money to clothe her ragged Continentals by a lottery, and the Philadelphia journals of January 11, 1777, contain the official advertisements, showing that this lottery, called "The United States Lottery," would contain 42,317 prizes and 57,683 blanks. In a postscript we are told that "this lottery was set on foot by a resolution of Congress, passed at Philadelphia the 18th day of November, 1776, for the sole purpose of raising a sum of money for carrying on the present

just war, undertaken in defense of the rights and liberties of America, in which every individual and posterity will be so deeply interested. It is not doubted but every real friend to his country will most cheerfully become an adventurer, and that the sale of the tickets will be very rapid, especially as even the unsuccessful adventurer will have the pleasing reflection of having contributed in a degree to the great and glorious American cause." As showing how little our fathers questioned the morality of lotteries, the following section from the Maryland Journal of April 29, 1780, may be quoted:

> The following proposal for raising a sum of money to be applied toward building a new church in St. Paul's parish, in Baltimore town, are offered to the public, and it is hoped the good purposes expected from the sacred institution which carries to all the Divine blessing, independent of the advantageous terms offered to the adventurer, will be a sufficient inducement for a speedy sale of the tickets.
>
> Thirty-eight hundred and thirty-seven prizes, amounting to $320,000; 8,163 blanks; 12,000 tickets at $40 each. The prospect of pecuniary success to the purchaser from the above scheme is sufficiently apparent, there being but little more than two blanks to a prize. "He who giveth to the poor lendeth to the Lord."

If it be necessary to convince the court as to the extensive use of lotteries for commercial and philanthropic purposes, I beg reference to the very interesting communication addressed by Thomas Jefferson,

in the last days of his life, to the legislature of Virginia, to be found in his collected works, Volume IX, page 500. Jefferson was then a very old man, and had become impoverished by unwise indorsements of other people's obligations. His sole resources consisted in valuable lands in Virginia, including Monticello, for which no purchaser could be procured. Virginia had passed a law which prohibited the conduct of lotteries, and Jefferson addressed a communication to the legislature asking permission to conduct a lottery, in order that he might sell his lands and pay his debts. An extract from this communication is printed as an appendix to this brief, in order that the court may know the extent and varied uses for which lotteries were conducted at the time the Constitution was framed, and to prove thereby that the framers of the Constitution did not question the fact that lottery tickets were an ordinary and legitimate subject of purchase and sale. Indeed, it may be added, as illustrated by Mr. Jefferson's communication, and also by the acts of the first American Congress, already referred to, that lottery tickets were not only ordinary articles of commerce, but were a valued and recognized agency or instrumentality of commerce, whereby governments—national, State, and municipal—raised moneys for public purposes, and whereby property, otherwise unsalable, was disposed of. In the Century Dictionary, under the word "lottery," it is stated that "most of the governments of the continent of Europe have at different periods raised money for

public purposes by means of lotteries, and a small sum was raised in America during the Revolution by a lottery authorized by the Continental Congress." That this is still true of nearly all governments except our own has already been shown by reference to the French Government, and it may be added that a practical lottery used as a fiscal instrumentality by the Austrian Government as late as 1890 was under review by this court in the case of *Edward H. Horner* v. *United States* (147 U. S., 449), and held to be a lottery, notwithstanding that the purchaser received, instead of the usual ticket, a bond issued by the Empire of Austria under which he would receive the sum of 100 florins, with a possibility that it would be redeemed for a very much larger amount as a result of certain drawings. These bonds were issued by the Empire of Austria for the purpose of raising revenue for the Government and were Government obligations.

IV. THE NATURE OF A LOTTERY TICKET.

In this connection it is well to consider the exact nature of a lottery ticket. It is argued by appellant that it is not an article of commerce on the ground that it is merely the evidence of title to an intangible interest in the drawing of a lottery, or at least an executory contract whereby the holder is entitled to receive a certain sum of money upon the happening of a certain contingency.

I respectfully submit that this is too narrow a view. In considering the question it is well to distinguish between the abstract legal idea of such a ticket and its

commercial or popular nature. For commercial purposes it must be regarded in the light in which it is bought and sold. And, so viewing it, it is more than a piece of paper; it is a *thing* which not merely evidences value, but which carries value with it when bought and sold or transported. Before the drawing takes place it has value in the hands of its possessor; he can obtain value for it and such value increases or diminishes as the result of the drawing affects it. To transfer title to it requires no indorsement, and no written assignment is necessary and no consent is required to such transfer on the books of the company. It is more than a contract; more than a certificate of a share of corporate stock; more than a bond. It is the *thing* itself, which, from time immemorial, has been bought and sold and has intrinsic value as such. Thus, the present ticket says, "This whole ticket entitles the *holder* thereof to the whole of such prize," etc. As such, it was a thing of value, which passed property of value from man to man by mere physical delivery, and which was bought and sold by men as a thing of inherent value. In buying and selling such articles men are not guided by refined and metaphysical distinctions such as may trouble the legal mind, and the popular conception of a lottery ticket should determine in giving it its true character as an article of commerce. To illustrate: Suppose, at the time the State of Louisiana authorized the Louisiana Lottery to conduct its drawings that a citizen of New York should send a draft for $5,000 to purchase 1,000 tick-

ets in such lottery, and the tickets should be shipped from New Orleans to New York City and exposed by the purchaser for sale in his store as purchasable commodities. Can it be questioned that, according to the common acceptation of commerce, such purchase and sale was a commercial transaction, and that the merchandise thus shipped was a commercial shipment?

This court has not favored refined legal distinctions which attempt to destroy the nature of property. As has already been shown in the case of *Clark* v. *The City of Washington* (12 Wheat., 40), a lottery ticket has been held to be a proper subject for a suit at law and recovery therein. Similarly, in the case of *Jolly* v. *United States* (170 U. S., 402), where a man was indicted for the larceny of postage stamps under 5456 Revised Statutes, which makes it a crime to feloniously take away "any kind or description of personal property belonging to the United States," the question arose as to whether postage stamps were personal property, and the distinction now sought to be made by the appellant was then urged, that a postage stamp was but a piece of paper and not intrinsically valuable. Even in a case involving the liberty of a subject this court declined to accept this narrow view.

In the opinion of Mr. Justice Peckham, it is said:

> Postage stamps while in the hands of the Government, ready to be sold and used, are most surely its personal property. * * *
>
> There is, while the stamps are in the possession of the Government, some intrinsic value in the stamps themselves as representatives of a

certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps. They are incapable of being distinguished the one from the other. All postage stamps of the same denomination are alike, and the moment they are taken from the possession of the Government they are valuable in proportion to their denomination and are subject to use, the same as if they had been purchased, because it is wholly impossible for the Government to detect or identify any particular stamp as having been stolen or otherwise fraudulently put in use. Once out of the possession of the Government they may be used for their full value to obtain carriage by mail of the article to which they are affixed. There is every reason therefore why such stamps should be regarded as personal property even while in the possession of the Government. They become valuable to the amount of their denomination the very instant they get into the possession of another. They are not mere obligations, but a species of valuable property in and of themselves the moment they are out of the possession of the Government.

It is true that at common law, when larceny was punishable by death, the courts in favor of life held that only movable goods having an intrinsic value could be the subject of larceny, and not written instruments as such. But even then written instruments could be the subjects of larceny when described as a piece of paper or parchment, and the common-law definition of what

personal goods consist has been materially enlarged by various statutes. "Property" in its legal sense is the exclusive right of possessing, enjoying, and disposing of a thing (*Chicago R. R. Co.* v. *Englewood R. R. Co.*, 115 Ill., 375–385), and therefore a lottery ticket does constitute property, could at this day be the subject of larceny, and for commercial purposes is clearly an article of commerce. Only the legal profession, with its subtle distinctions, would for one moment question so obvious a fact.

Every State statute which forbids the purchase and sale of lottery tickets necessarily implies that such purchase and sale are commercial transactions. Can it be possible that Congress may not forbid the transportation of such articles of purchase and sale from State to State when the States themselves have taken sufficient cognizance of the frequency of such transactions to make them criminal offenses?

Assuming, however, that the essence of the transaction is the purchase and sale of an *interest* in a lottery, which is only evidenced by the ticket, does the transaction become less a commercial one? Does the transportation of the ticket as an incident to such commerce become less subject to the commercial power of the Union? The appellant in effect contends that there can be no interstate commerce in anything that is not visible and tangible. I can not admit this.

Certainly there is nothing in the clause of the Constitution under discussion which requires such a construction. The framers used but twenty-one words to

convey absolute and exclusive power to the Federal Government to regulate commerce between the States and with foreign nations and Indian tribes. The only word used to define the subject-matter is "commerce." None could have been used more comprehensive, for it clearly includes whatever may be the subject of purchase or sale. To argue that commerce can only consist of the purchase of tangible or visible commodities is to read a qualifying clause into the Constitution. Its language neither requires nor implies any such distinction. It embraces within its sweeping meaning whatever may be bought or sold.

In the leading case of *Gibbons* v. *Ogden* (9 Wheat., 1) the great Chief Justice gave a definition to the word "commerce" which is often quoted and has never been surpassed. The facts of this familiar case need not be mentioned except to note that it was a bill filed by Ogden against Gibbons, asserting that the said Ogden had acquired by assignment from Livingston and Fulton the exclusive *right* to navigate the waters between Elizabethtown and other places in the State of New Jersey and the city of New York, and asking that the defendant Gibbons be restrained from violating such exclusive privilege. It is to be observed, therefore, that the matter in dispute was the *abstract and exclusive right* of navigation of a tidal river, and it was contended by the appellant that such exclusive privilege was void and that it was an infringement of the exclusive power of Congress to regulate interstate commerce. This leading case, therefore, turned upon the question of an

abstract right, and not upon the actual transportation of any tangible commodity. Mr. Oakley argued that commerce is only "transportation and sale of commodities," while Mr. Emmett gave the definition as "the exchange of one thing for another, the interchange of commodities, trade, or traffic." Mr. Wirt claimed in reply that it "always implies intercommunication and *intercourse*." This last definition was adopted by the court in the oft-quoted definition of the Chief Justice, as follows:

> The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

In his concurring opinion Justice Johnson said:

> The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made.

In defining commerce he says:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nations which could not legislate over these subjects, would not possess power to regulate commerce.

The comprehensive definition of commerce which was thus given in *Gibbons* v. *Ogden* has never been departed from by this court, and it has been held to apply not only to the instrumentalities of commerce, but likewise to human beings themselves who were not the subject of purchase or sale. Thus, in the *Passenger cases* (7 How., 283) (argued by Webster and Choate), the health commissioners of the port of New York

placed a tax upon each cabin and steerage passenger arriving at that port from foreign countries. The whole subject of the commercial power of the Union was, as the court well knows, exhaustively reviewed by all of the justices in separate opinions, and the conclusion reached that the mere entry of passengers into a port is commerce, although such passenger may come and go without any special reference to the purchase or sale of commodities. As to what commerce is, Mr. Justice McLean says:

> Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question.

He directly negatives the suggestion that passengers not being imports their transportation therefore can not be commerce. Mr. Justice Wayne, after criticising the dictum in *City of New York* v. *Miln* (11 Pet., 102) that persons "are not the subject of commerce," reaffirms the definition of commerce contained in *Gibbons* v. *Ogden*. Mr. Justice Grier, in his opinion, argued that if the States had the power to exclude aliens one of the chief objects for which the Union was formed had totally failed, and he adds:

> Commerce, as defined by this court, means something more than traffic,—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse.

In *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196, 203), Mr. Justice Field said:

> Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive.

It is not alone the carriage of passengers in a boat or railroad car or other method of public or private conveyance. It has recently been held that the mere passage of foot passengers from one side of the Ohio River to the other side is commerce. In this opinion

(*Covington Bridge Company* v. *Kentucky*, 154 U. S., 204, 218) Mr. Justice Brown said:

> Commerce was defined in *Gibbons* v. *Ogden* (9 Wheat., 1, 189) to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

It has been held, moreover, that even the invisible messages which are transmitted along telegraph lines from citizens of one State to citizens of another are commerce. In *Pensacola Telegraph Company* v. *The Western Union Telegraph Company* (96 U. S., 1) an act of Congress was under question which provided for the construction of telegraph lines. It was held to be a valid regulation of commerce and to be superior to a statute of Florida which gave to the Pensacola Telegraph Company the exclusive right of operating telegraph lines in that State. Mr. Chief Justice Waite delivered the opinion of the court, in the course of which he said:

> Since the case of *Gibbons* v. *Ogden* (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress.

> Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.
>
> * * * * *
>
> The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than 80 per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

In *Western Union Telegraph Company* v. *Pendleton* (122 U. S., 347), a statute of the State of Indiana which required telegraph companies to deliver dispatches by messenger to the addressees, under certain conditions, was held to be in conflict with the interstate-commerce clause of the Constitution as an attempt to regulate the delivery of such dispatches. It was held that the authority of Congress over the subject of commerce by

telegraph was supreme. In the opinion of the court, Mr. Justice Field alludes to the fact that the telegraph messages held to be within the commercial power of the Union are invisible and intangible. He says:

> Although intercourse by telegraphic messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. *Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously.* It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.

In *Ratterman* v. *Telegraph Company* (127 U. S., 411), and *Leloup* v. *Port of Mobile* (127 U. S., 640), the same rulings were followed. In the latter case the State of Alabama attempted to impose a license tax upon a telegraph company as a condition of doing business within its jurisdiction, although a large part of the business of

the company was the transmission of messages from one State to another, and although the company had the powers conferred by the act of Congress passed July 24, 1866. Says Mr. Justice Bradley:

> *In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary.*

It is not merely messages in regard to business transactions that can not be taxed by the State. No interstate messages can be taxed, whatever may be their import. Among interstate telegrams there is no distinction made between commercial and noncommercial telegrams. Thus, in the Texas case above cited, the court say of a tax regulated by the number of messages sent (p. 466):

> Clearly * * * this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. * * *
>
> It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the Government on public business, is erroneous.

V. WRITTEN INSTRUMENTS WITHIN INTERSTATE COMMERCE POWER.

As further illustrating the fact that the commercial power of the Union has regard not merely to articles of commerce, but also to evidences of title with respect to such property, or to the ordinary commercial methods by which they are bought and sold and transported, I may refer to the case of *Almy* v. *California* (24 How., 169). In this case the constitutionality of a law of the State of California, which imposed a stamp tax upon certain instruments of writing, among other bills of lading for the transportation of gold or silver coin, or gold dust, or gold bars, was in question. The plaintiff in error received at San Francisco a quantity of gold dust for transportation to New York, but refused to stamp the bill of lading in conformity with the act. This court, in an opinion by Chief Justice Taney, held that the case was analogous to *Brown* v. *The State of Maryland*, where a license tax of $50 was imposed on importers of foreign commodities before they were permitted to sell goods thus imported. Following the reasoning in that case, the court held that it was impossible to distinguish between the commodity sold or transported and the bill of lading which represented it; that such a bill of lading, although only a piece of paper and an evidence of title, was, nevertheless, a necessity of commerce and could not be taxed. Says the Chief Justice:

> *But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped,*

is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a shipmaster without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.

Similarly in the present case, that which was sold by the lottery company in Paraguay through an agent in Texas to the citizen of California was a property in-

terest in a joint enterprise called a lottery, which, according to commercial law, was perfectly valid. The lottery ticket which was transported was essential to this transaction of purchase and sale. As Chief Justice Taney said in *Almy* v. *The State of California*, "The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country." Such a ticket is more than a mere receipt for money. It is, as a bill of lading, or as a deed to real estate, the tangible, visible evidence of a property right and essential to the transaction of this class of business, for it is inconceivable that men would buy shares in a lottery upon mere oral promises and without some evidence of their legal interest in the result of the drawing. Following the reasoning in the Almy case, therefore, the ticket is as much within the commercial power of the Union as the interest that was bought and sold. Such a ticket could be resold a hundred times. It could be the subject of a suit. It has unquestioned value, and can be bought and sold as any other commodity. The reasoning of the Almy case was followed in the recent and famous case of *Pollock* v. *The Farmers' Loan and Trust Company* (157 U. S., 582, 591).

It is true that in the Almy case the decision was placed upon the mistaken ground that goods shipped from San Francisco to New York were exports. The Supreme Court in the subsequent case of *Woodruff* v. *Parham* (8 Wall., 123, 137), while sustaining the authority of *Almy* v. *The State of California*, placed it on

the true ground that the tax on the bill of lading was not void as a tax on exports, but was void as a regulation of interstate commerce, and the two cases, therefore, read together, clearly establish that a tax on a written instrument which of itself is of no intrinsic value, and which simply represents title, but which is ordinarily used in the purchase and sale and interstate transportation of commodities, is a regulation of interstate commerce, and if imposed by a State is void.

In the *Woodruff* v. *Parham* case Mr. Justice Miller says with reference to the Almy case:

> It seems to have escaped the attention of counsel on both sides, and of the chief justice who delivered the opinion, that the case was one of interstate commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. * * *
>
> The case, however, was well decided on the ground taken by Mr. Blair, counsel for the defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in Crandall *v.* Nevada, and with the authority of Congress to regulate commerce among the States.

It would be destructive of that power, were this not the case, as in the complicated methods of modern business a great portion of all business is done by means

of written instruments, and if the States had power to restrain, regulate, prohibit, or tax these at pleasure, they could destroy commerce itself. Take, for example, checks on banks. They are not even the evidence of title, but simply a direction to a given bank to pay certain moneys to the payee of the check. Their use has largely superseded the use of money of intrinsic value in the ordinary exchange of commodities, and it is probable that nine-tenths of all the business of the country is transacted through drafts, checks, certificates of deposit, bills of exchange, promissory notes, etc. If it be held that a lottery ticket is not an article or instrumentality of commerce, because it is intrinsically only a piece of paper, it is equally true that all other commercial instruments, such as I have named, are equally removed from the commercial powers of Congress when used in connection with interstate business. Is it possible that the whole complicated mechanism of modern business, transacted almost entirely upon paper, can, when interstate and commercial in character, be taxed to death or restrained at the will of a State legislature? Under the authority of *Almy* v. *California* this can not be done as to bills of lading, and it is impossible to distinguish in principle between a bill of lading and any other instrument of writing above mentioned, including a lottery ticket, which certainly reaches nearer to the definition of property than a promissory note, which is a mere contract, or a check, which is a mere direction upon a banker to pay. The ticket is more than a direction to pay or a receipt

for money taken. It is a visible, tangible, outward evidence of a property right which from time immemorial has been a subject of barter and sale in all civilized countries, and is more analogous to a stock certificate or bond, both of which are commonly regarded for modern commercial purposes as not only the evidence of property but property itself.

VI. THE INSURANCE CASES.

The only authorities which seem in any way to conflict with this reasoning are the insurance cases, commencing with *Paul* v. *Virginia* (8 Wall., 168), and continuing to *Hooper* v. *California* (155 U. S., 648). This is the only line wherein intercourse between persons in different States, carried on for the purpose of profit, has been held not to be commercial. It will be noticed that this court has never had the question squarely presented whether Congress may enact legislation regulating the interstate insurance business. In reading the court's opinion upon these insurance cases the question actually presented to the court must be kept in mind. (*Woodruff* v. *Parham*, 8 Wall., 123, 138.) The precise point decided is that the insurance business is not so commercial in character that a State is obliged to admit such foreign insurance corporations, although there are commercial corporations, such as express companies, which it is obliged to admit. The foundation of all these decisions was that such corporations, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created, and that, therefore, their right to do business in another

State depends upon the grace of such State, which can impose terms or restrain altogether. In the course of his opinion in *Paul* v. *Virginia* Mr. Justice Field unquestionably intimated that a policy of insurance was not a transaction of commerce. He also says, as the ground of the decision:

> *The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York while in Virginia would constitute a portion of such commerce*

This would seem to be the true ground for the decision, for when a foreign corporation secures permission to do business in another State it establishes an agency and the entire contract of insurance takes place between the agent and the insured, within the State, and the transaction, therefore, is not an interstate one.

That this is the true doctrine of this class of cases is shown by Chief Justice Waite in *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (96 U. S., 1), when he said:

> We are aware that in *Paul* v. *Virginia* (8 Wall., 168) this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the

several States." Art. 4, sec. 2. *That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented.*

In this connection, I beg especial reference to the learned opinion of the circuit court of appeals for the sixth circuit, which is printed as an appendix to this brief, where the true doctrine of these insurance cases is discussed by an appellate court. (See *infra*, p. 65.) Whatever be the true doctrine of these cases, it is enough to say that the lottery traffic is not analogous to insurance, as has already been shown.

Moreover, the business is not conducted, as Mr. Justice Field showed that the insurance business was conducted, practically within the limits of a single State, but may be not only interstate, but, as in the case at bar, international; and the case at bar is upon both grounds clearly distinguishable from the insurance cases, whose authority, therefore, is not necessarily in question here.

The soundness of our contention may be tested in another way, and that is by viewing the present transaction, not as interstate, but as a commercial transaction of citizens of the United States with a foreign power. It must be remembered that in this case the Pan-American Lottery Company is a corporation of Paraguay, and transacts its business through an agency in Texas, which, in turn, sells tickets to citizens of other States. If lottery business is not commercial within the meaning of the Constitution, for the purposes of

interstate traffic, it is equally true that it is not commercial for purposes of foreign commerce. If this be true, then it follows that section 10 of the act of Congress quoted at the commencement of this brief (act of August 27, 1894), which forbids the importation of lottery matter, is also unconstitutional. Can it be possible that the United States is without power to exclude the importation into the United States of lottery tickets? Indeed, it can be fairly argued that this act of Congress is a recognition that such tickets are articles of merchandise which are capable of transportation. They are treated as any other imports which are brought into a port of entry, and can be proceeded against, seized, forfeited, and destroyed under the provisions of the act mentioned. Here is a recognition that lottery matter has been the subject of our foreign commerce, and the exclusion of such matter can only be justified under the power to regulate such commerce. This, as any other right to regulate commerce, may be of value to this country. It might, for example, be a great object to the French Government to secure permission to sell the tickets of the Panama Lottery Company throughout the United States. Could not the United States admit such matter if it thought it advantageous to other interests, and if the tariff legislation of France were regarded as reciprocal?

Mr. Guthrie, in his very able brief, appreciates the force of this argument and attempts to distinguish between the power of Congress to regulate foreign commerce and interstate commerce. He concedes that Congress "may exclude persons, commodities, or printed

matter of any nature whatsoever, whether or not related to or connected with commerce." But the distinction is not well founded, for this court has decided in *Brown* v. *Houston* (114 U S., 622, 630) that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

The case of *Cohens* v. *Virginia* (6 Wheat., 264), cited by Mr. Guthrie, does not disturb this conclusion. The question involved was not whether a lottery ticket was an article of commerce, nor was the extent of the power to regulate commerce necessarily involved in the case. Congress had authorized the city of Washington to conduct a lottery for the purpose of erecting public buildings within the District of Columbia. It was held that, under a strict construction of the grant of corporate power, no authority was given to sell the tickets outside of the city of Washington, and that, therefore, the sale in Virginia was invalid. Says Chief Justice Marshall:

> It has been held that the States can not make it unlawful to buy that which Congress has made it lawful to sell. This proposition is not denied, and therefore the validity of a law punishing a citizen of Virginia for purchasing a ticket in the city of Washington might well be drawn into question. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery tickets in Virginia is of a different character. Before we can

impeach its validity we must inquire whether Congress intended to empower this corporation to do any act within a State which the laws of that State might prohibit.

The court reached the conclusion that "the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation."

VII. POWER TO REGULATE INTERSTATE EXPRESS COMPANIES AS AN INSTRUMENT OF COMMERCE.

The argument has heretofore been directed to the suggestion that lottery tickets and the lottery business were commercial in their character. The constitutionality of the act need not, however, rest upon this assumption, for it can be sustained on the ground that it was a regulation of express companies, and these, being instrumentalities of commerce, are subject to Federal control.

It is true that the act of Congress does not specifically mention express companies; but the title of the act, and its body, read in connection with previous decisions and the known history of the legislation, clearly shows that the act was aimed to prevent express companies from transporting that which Congress had already excluded from the mails. (See *infra*, pp. 10, 11, 12.) In the present case the matter was transported by the Wells-Fargo Express Company, and therefore the question arises whether Congress has power to provide that no express company may transport lottery tickets from State to State.

There are certain instrumentalities of commerce which are regulated without reference to the motive or character of particular transactions. Thus, Congress, in regulating interstate telegraph companies, does not attempt to discriminate between messages which are sent for commercial purposes and those for other purposes. It would be impracticable to do so. While 80 per cent of all messages may be commercial in their character, yet a considerable percentage have no reference to commerce whatever. And yet, all messages, of whatever character, are, when interstate, subject to Federal control, on the theory that the telegraph company as a unit is an instrumentality of interstate commerce and subject to Federal control. Similarly, railroads engaged in interstate transportation are subject to like control, notwithstanding that they may carry many passengers who are traveling for pleasure and for purposes that are wholly noncommercial. Express companies have been treated likewise as a unit, and States have been compelled to permit their entry, notwithstanding that much of their business is noncommercial in its character. Similarly, in the *Passenger Cases* a State tax upon cabin and steerage passengers was held unconstitutional, and no attempt was made to discriminate between passengers who came for commercial purposes or for purely personal reasons. If an express company can compel a State to admit it without regard to the nature of its business, provided always that it is interstate, then Congress can regulate

that which an express company may transport from State to State without discriminating between the character of the matter thus transported. In other words, the jurisdiction is secured, not by reason of the character of the business in the particular case, but because the company itself is an instrumentality of commerce and subject, as a unit, to legislative control. We submit, therefore, that Congress had power to pass this act to the extent that it forbids any recognized instrumentality of commerce, such as a ship, railroad company, express company, or telegraph company, from carrying lottery matter, even though such lottery matter be not itself commercial in character. This is so fully sustained by the reasoning of this court in the class of cases referred to that citation or further comment seems unnecessary.

VIII. POWER TO PROTECT "LEGITIMATE" COMMERCE.

(3) That even if lottery tickets be not articles of commerce, yet, if Congress was of opinion that their importation into this country, or their purchase and sale between citizens of the various States and transportation from State to State, was injurious to interstate commerce, the power to regulate such legitimate interstate commerce includes the power to suppress, when interstate, the traffic in lottery matter, which, even if it be not interstate commerce, is yet detrimental to such commerce.

Assuming that lottery tickets or shares are not articles of commerce, and also that express companies as instrumentalities of commerce may not be prohibited from carrying lottery matter, I pass to another view of

the case in which the constitutionality of the act may, it seems to me, be justified.

What has been the purpose of the lottery legislation, State and national? Lotteries are not *mala in se*, or inherently immoral. They are *mala prohibita*, and are forbidden because of their injurious consequences upon what may be termed legitimate business and public morals. That this has been the purpose of Congress is shown by all its legislation on the subject of lotteries, for they continually refer (see R. S., 3894) to "lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses." Later in the same act the general expression "gift enterprise" is used to include all such methods of buying or selling other commodities by the offering of prizes. The same view runs through the State statutes, and the evil aimed at was the practice of many commercial enterprises, such as tea companies, to offer prizes in connection with the sale of their commodities. Concerts would be given with prizes with every ticket, or every purchaser of a pound of tea would have the opportunity to obtain a grand piano. These methods of stimulating business were felt to be injurious to commerce, and hence this repressive legislation. If, therefore, Congress was of the opinion that the interests of legitimate interstate commerce required the prohibition of such methods, thereby

made illegitimate, would not the power to regulate legitimate commerce be fairly inclusive of the power to prohibit the illegitimate methods by lotteries, raffles, etc., when clearly interstate in its character?

If, for example, a Chicago beef company should, in selling meat throughout the United States, offer a prize for every purchase, and the possibility of a very great prize depended upon chance, would not the power to regulate interstate commerce in the meat fairly include the suppression of the method whereby such interstate commerce was conducted? That such a purpose was one of the purposes of this lottery legislation can not be questioned. Whether it was sufficient in magnitude to justify the legislation is a question for Congress, which this court would not review.

IX. POWER TO REGULATE IS POWER TO PROHIBIT.

The power to regulate interstate or foreign commerce implies a power to prohibit such commerce in any given article.

In *Gibbons* v. *Ogden* (9 Wheat., 1, 196), Chief Justice Marshall said:

> We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

The power over interstate commerce is the same as that over foreign commerce. Both are granted in the same clause of the Constitution and in the same language. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 228; *License cases*, 5 Howard, 504, 578; *Brown* v. *Houston*, 114 U. S., 622, 630; *Bowman* v. *Chicago, &c., R. R. Co.*, 125 U. S., 465, 482; *Crutcher* v. *Kentucky*, 141 U. S., 47, 58; *Pittsburg Co.* v. *Bates*, 156 U. S., 577, 587; 2 Story on the Constitution, sec. 1065.) In *Leisy* v. *Hardin* (135 U. S., 100, 108) Chief Justice Fuller said:

> The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution.

In the exercise of its power to regulate foreign commerce Congress has never hesitated to prohibit commerce in any particular article, or even to stop foreign commerce altogether, either for a fixed period of time or indefinitely. A well-known instance of partial prohibition is that of obscene literature, which has been part of our laws ever since the tariff act of August 30, 1842 (ch. 270, sec. 28). To the latter class belong the well-known nonimportation and embargo laws of the period prior to the war of 1812. (See *Gibbons* v. *Ogden*, 9 Wheat., 1, 192–3; 2 Story on the Constitution, secs. 1264, 1289, 1290.)

Congress has the same power over interstate commerce as over commerce with the Indian tribes. The

question whether, under its power to regulate commerce with the Indian tribes, it could exclude any selected article from such commerce as deleterious, came up for decision in *United States* v. *Holliday* (3 Wall., 407, 416–418), and was decided in the affirmative in an opinion by Mr. Justice Miller. This ruling was reaffirmed in *United States* v. *43 Gallons of Whiskey* (108 U. S., 491), in an opinion by Mr. Justice Davis. Both of these cases related to the statute prohibiting the sale of spirituous liquors, whose constitutionality has since then been assumed without question. (*United States* v. *Le Bris*, 12 U. S., 278; *Sarlls* v. *United States*, 152 U. S., 570; *United States* v. *Mayrand*, 154 U. S., 552.)

If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?

The principle has in effect already been decided by this court. States have undertaken in the interests of the public health to exclude importations of a certain kind from other States, and their legislation has been held by this court to be unconstitutional. (*Railroad Co.* v. *Husen*, 95 U. S., 465; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62.) These laws were not held

to be void, because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in from foreign countries. (*License cases*, 5 How., 504, 623; *Woodruff* v. *Parham*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622, 628; *Coe* v. *Errol*, 116 U. S., 517, 526; *Pittsburg Co.* v. *Louisiana*, 156 U. S., 590, 600.)

The laws were held void because they were regulations of commerce. But the Constitution does not expressly prohibit States from regulating commerce. It merely gives the power of regulation to Congress. Whenever, therefore, this court has held a State law void as being a regulation of commerce, it has impliedly held that a law to the same effect could constitutionally be passed by Congress; that is, so far as Congress is not restrained by some express prohibition.

Indeed, the most familiar exercise of the power to regulate commerce in the minds of the men who framed the Federal Constitution was, doubtless, the total or partial prohibition of traffic in particular articles. This was often accomplished by duties; and those duties, so far as they were laid for prohibition, total or partial, and not for revenue, were regarded as regulations of commerce. Thus Chief Justice Marshall, in his Life of Washington, uses the following language in speaking of the American colonies before the Stamp Act of 1765 (Vol. II, pp. 76–77, 1st ed.):

> In the middle and southern provinces the authority of such of the acts of Parliament of internal revenue as were made for America, as

well as those for the regulation of commerce, even by the imposition of duties, provided those duties were imposed for the purpose of regulation, had been at all times admitted.

And again the Chief Justice says (Vol. II, p. 81, 1st ed.), speaking of the Stamp Act:

> The colonies had long been in the habit of submitting to duties laid on their trade, and had not generally distinguished between those which were imposed for the mere purpose of regulating commerce and this, which, being also designed to raise a revenue, was in truth to every purpose a real tax.

In *Gibbons* v. *Ogden* (9 Wheat., 1, 202), speaking of the constitutional restriction upon the powers of the States in the matter of duties on tonnage, the Chief Justice says:

> It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was therefore a prudent caution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. The right to regulate commerce even by the imposition of duties, was not controverted; but the right to impose a duty for

> the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary war. We may refer to the journals of the Continental Congress, vol. 1, pp. 28, 175, 176; vol. 2, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's "Letters from a Farmer," published in 1768, pp. 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 146); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, sec. 963; 2 id., 1080, et seq.; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, vol. 3, p. 571); his letter to Cabell of September 18, 1828 (id., p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–23; Speech

of Thomas Smith Grimké, etc., Charleston, 1829, p. 51. Mr. Grimké states that (p. 62):

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to prohibit their commodities to impose or increase the duties on them.

A recent instance of the imposition of duties under the power to regulate commerce is to be found in the act of August 3, 1882, chapter 376, section 1, which provides "that there shall be levied, collected, and paid a duty of 50 cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States." In *Head Money Cases* (112 U. S., 580, 595), Mr. Justice Miller, in delivering the opinion of the court, says that "the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce." (See also Mr. Justice Blatchford's opinion in this case at 18 Fed. Rep., 135, 139, quoted by Mr. Justice Field in *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S., 429, 594.)

In its application to imports, the power to impose such exactions or duties is a power to exclude. (*Passenger cases*, 7 How., 283, 461, 463; see *McCulloch* v. *Maryland*, 4 Wheat., 316, 431.) There can be no doubt that Congress, under its power to regulate commerce, in so far as not prohibited by the Constitution, may do either. It can not, indeed, levy pecuniary

exactions upon interstate commerce for revenue purposes. It can, however, so long as it does not discriminate against the ports of any of the States, restrict commerce in any article by means of such charges; or it can, as in this instance, prohibit it altogether.

X. PROHIBITION DISCRETIONARY WITH POLITICAL BRANCH OF THE GOVERNMENT.

The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit are not reviewable by the courts.

An implied power can be exercised only for the purposes for which it is required, but an express power is unlimited and may be exercised whenever Congress in its discretion shall see fit. Thus in *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said of the power to incorporate:

> Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the Government.

It may be argued that this prohibition of lottery traffic is in aid of the police power of the States, or even an attempt by Congress to supply deficiencies in the exercise of police power by certain States; and that Congress is not vested with such police power. Were this so, nevertheless Congress, having an express and unlimited power to regulate interstate commerce,

may do so without having its reasons questioned. (See *Doyle* v. *Continental Ins. Co.*, 94 U. S., 535, 541.) It is well settled that Congress has no power to regulate an agricultural or manufacturing industry within a State (*United States* v. *E. C. Knight Co.*, 156 U. S., 1, and cases cited); yet, as above shown, it has always claimed and exercised a right to use its commercial power for the purpose of directing the course of development of these industries. Congress has no power to regulate the descent of real property in the various States; yet it has always had, and frequently exercised, the power to make treaties for the purpose of altering these laws of descent on behalf of the subjects of favored European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.) The exclusion of obscene articles from foreign commerce and of spirituous liquors from commerce with the Indian tribes is for purposes precisely similar to those which inspire our anti-lottery legislation.

XI. SUCH REGULATION NO ABRIDGMENT OF FREEDOM OF PRESS.

It may be suggested, however, by appellants that the act is unconstitutional for the further reason that it abridges the freedom of the press. I can not believe that this suggestion needs extended argument. The liberty of the press is the freedom to express and circulate printed *opinions*. It can not include lottery matter for two reasons. In the first place, such freedom does not include the right to circulate that which,

in the legislative discretion of a country, is immoral or indecent. It could not be contended that obscene literature has freedom of circulation because it is printed. If so, every statute punishing the printing, sale, or circulation of indecent literature is invalid. Congress has seen fit to place lottery matter upon the same ground as indecent literature or other fraudulent or immoral devices, and the freedom of the press is obviously subject to this fundamental limitation imposed by good morals. Moreover, the freedom of the press is the freedom to express printed opinions, and, while lottery advertisements might be within this definition, yet a lottery ticket is not an expression of an opinion in any sense of the word. It is purely a commercial instrument, and its prohibition in no way infringes upon the right to express opinion and circulate the same. All this seems so obvious that no further argument need be made. See *Ex parte Jackson* (96 U. S., 727, 736), *In re Rapier* (143 U. S., 110), and *Horner* v. *United States* (143 U. S., 207), where such police power is clearly upheld. In the Rapier case, Chief Justice Fuller said:

> The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the

grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

APPENDIX.

A.

OPINION OF THE COURT IN REILLEY v. UNITED STATES.

CHARLES W. REILLEY AND OTHERS, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA, defendants in error.
} No. 849.

United States Circuit Court of Appeals for the Sixth Circuit.

Error to the District Court of the United States for the Southern District of Ohio.

Submitted January 17, 1901. Decided February 12, 1901.

[The case was argued before Lurton, Day, and Severens, circuit judges, and the opinion was delivered by Severens, C. J. After reciting the acts of Congress involved, and stating at length the form of the indictment and the facts proved in the case, the learned judge delivered the following opinion with reference to the legal questions involved:]

The first question to be resolved arises upon the contention made by counsel for plaintiffs in error, that upon the due construction of the first section of the act of March 2, 1895, the successive clauses enumerating the several cases in which the offense may be

committed, all depend upon a condition which is supposed to exist in consequence of the words first occurring, that the paper, certificate, etc., has been brought into the United States from abroad for the purpose of disposing of the same. It is argued that this must be so for the reason, and this is the principal ground of the argument, that by the second section of the act there is an express provision that no former statute against the establishment of lotteries, traffic in lottery tickets, the circulation thereof or of advertisements relating thereto, should be deemed to be repealed by implication. Without going through with a reference to, and an analysis of, all such former statutes, it is sufficient to say that none such has been brought to our attention which is inconsistent with the statute in question, unless it be the act of September, 1890, which relates to the carriage of matter concerning lotteries in the mails, and which imposes a different penalty in such cases from that imposed by the act in question. From the fact of such discrepancy, it is contended that Congress must have intended that the language of the later act should be construed to refer only to things brought in from abroad to be disposed of in this country against which there had been no previous legislation imposing any other penalty than a forfeiture. There is some force in this argument, but we do not think it sufficient to overcome the clear indications to the contrary. In the first place, it would render the composition of the first section of the act of 1895 ungrammatical. In the next place, the title to the act indicates an intention to exert the power of Congress in all directions authorized by the clauses of the Constitution relating to the regulation of commerce and the establishment of a mail service.

Besides, the distribution of subjects by the language used in the latter part of the section reflects upon the former part a similar meaning. And the whole section is in apt language to cover the ground indicated by the title of the act. And we see no necessity for extending the condition that the matter is brought in "for the purpose of disposing of the same" to other cases than that of bringing it into the United States from abroad. We have no doubt that the purpose of Congress was to lay its hand upon the business at each and every one of the enumerated steps taken for the purpose of carrying it on, and that one of the steps it had in contemplation was the carrying of the instruments employed in the business from one State to another, and that as to this offense no qualification that the act should be done with the purpose of disposing of the thing carried was intended. We may at this point observe that inasmuch as the section of the act under consideration constitutes three distinct offenses, we do not conceive it to be necessary to determine to what extent the act is inconsistent, in respect to the forbidden use of the mails, with former statutes, or if there be such inconsistency, what the effect thereof may be, for the case before us does not involve that offense.

But the question upon which we have the gravest concern, and which is of much importance, arises upon the objection that the act of March 2, 1895, in so far as it relates to the mere carrying of the obnoxious matter from one State into another, though done with knowledge of its character, transcends the constitutional power of Congress. The statute was enacted in the exercise of the power to regulate commerce with other countries and between the States and the power to establish post-offices and post-roads. That part of the statute on

which the present indictment is founded depends upon the authority which may be exercised under the grant of Congress of the first of these powers, and the question is whether the business in which these parties were engaged is "commerce" within the meaning of that term in the Constitution. The question opens a field upon which some lines have been clearly marked, but with respect to the particular inquiry with which we have to deal, we have no distinct guide. Commerce is said by Chief Justice Marshall in the leading case of *Gibbons* v. *Ogden* (9 Wheat., 1) to undoubtedly mean "traffic," but to mean more than that and to signify "intercourse." But both of these latter are general words and do not precisely define what kind of intercommunication is meant; and we have to follow the course of subsequent adjudication in further elucidation of the scope and meaning of the word. Without going into other lines of inquiry than those which are most nearly relevant to the present subject, we come to the case of *Paul* v. *Virginia* (8 Wall., 168), where the question was whether an agent of a New York insurance company, who was engaged in effecting insurance for his company in Virginia with residents of the latter State, was subject to certain regulations of that State of the conditions and manner under and in which such business should be done. And it was held, first, that it was competent for the State to prescribe the conditions upon which the foreign corporation should be admitted to do business in the State, and, second, that the business of insurance, conducted as that was, was not interstate commerce. It is to be observed, however, that, as pointed out by Mr. Justice Field, the business there in question did not involve intercourse between one party in one State and another party in another State, for the transactions took

place wholly in Virginia, and the communications between New York and Virginia were wholly between the constituents of one party—that is to say, the insurance company and its agent—and the dealing was not between those persons. Said Mr. Justice Field:

> The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce

That case would seem to have sometimes received a wider interpretation than the decision upon the facts would justify, and to have been supposed to justify the proposition that a contract of insurance effected through interstate communication is not interstate commerce, but no authoritative decision affirming that proposition has been cited, or has been found by us. In the *Trade-mark cases* (100 U. S., 82) Mr. Justice Miller, in the course of reasoning from analogies, at page 95, said that "in *Paul* v. *Virginia* (8 Wall., 168) this court held that a policy of insurance made by a corporation of one State on property situated in another was not an article of commerce, and did not come within the clause we are considering." "They are not," says the court, "commodities to be shipped or forwarded from one State to another and then put up for sale." "On the other hand," pursues the learned justice, "in *Almy* v. *State of California* (24 How., 169) it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to

another out of the State was forbidden by the Constitution of the United States, because such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports."

With great deference to the learned justice we can not think that his statement of what was held in *Paul* v. *Virginia* was correct. And, moreover, the ground on which he says that that decision was placed, namely, that policies of insurance are not commodities to be shipped from one State into another, and there put up for sale, could not be supported as sufficient in view of what has been decided in other cases presently to be referred to, and would, as it seems to us, be much narrower than the bounds of the definition given in *Gibbons* v. *Ogden*.

The case of *Paul* v. *Virginia* was again cited in *Philadelphia Fire Association* v. *New York* (119 U. S., 110), but only in that case in support of the proposition that a State has power to prescribe the conditions on which a foreign corporation may be admitted to do business in the State. The question there was whether a foreign corporation which had entered the State and carried on business therein could question the validity of a law of the State prescribing such conditions. *Paul* v. *Virginia* was again referred to in *Hooper* v. *California* (155 U. S., 648), at page 653, which was a case involving the validity of a statute of California making it a misdemeanor for a person in that State to procure insurance for a resident thereof from a foreign corporation which had not filed the bond required by another statute of that State. The court held that the law was a valid exercise of the right of the State to prescribe conditions upon which the foreign corporation should be allowed to do business

therein, unless such business of the foreign company was one of a "Federal nature," one class of which is interstate commerce. To the contention that marine insurance (which was the business that the respondent was charged with having conducted without filing the bond required) was interstate commerce, and so beyond the reach of State authority, it was replied that "this proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul* v. *Virginia*" (8 Wall., 168; see also *Philadelphia Fire Insurance Association* v. *New York* (119 U. S., 110), and authorities there cited).

It is not within our province to question the law as declared by the court in that case, nor have we any disposition to do so, but for the purpose of comparing the classes of cases which we deem most relevant to our present duty, we are, no doubt, permitted to say that what we understand the language of the opinion last cited to mean is that the effecting insurance is not necessarily interstate business, and would not be so where the contract was made in the State and the participants in the transaction were in the State. The case does not decide that if by the method of doing the business the party desiring insurance in one State should transmit his application therefor to an insurer in another State, and the insurer should thereupon transmit to the insured his acceptance of the application, this would not constitute interstate commerce. But if this were so established, we do not think the doctrine would be applicable here for reasons hereinafter stated. This class of cases is principally relied upon by counsel for plaintiffs in error as declaring the rule that in order to constitute commerce there must be traffic in commodities, and that

interstate commerce involves also the transportation of such commodities from one State to another, and that mere business intercourse between parties residing in different States unaccompanied by the transportation of commodities such as are bought and sold by traffic is not within the scope of commerce between the States within the meaning of the Constitution. But we do not think that upon a comparison with other decisions of the Supreme Court so broad a doctrine was intended to be affirmed in the cases to which we have referred.

Passing to other classes of cases arising upon the exercise of the power in question, it has been frequently held, as was said by Mr. Justice Bradley in *Crutcher* v. *Kentucky* (141 U. S., 47), that the power of Congress over interstate commerce is coextensive with its power over foreign commerce. Indeed, both are included in an identical grant. Can it be possible to hold that Congress has not the power to prohibit the importation from abroad into the United States of instrumentalities for carrying on a business fraught with evil to its inhabitants? Or, to put a precisely relevant question, can it be doubted that Congress has the authority to legislate against the importation of lottery tickets into the United States from foreign countries, as it has attempted to do by this act? It would seem that the denial of such power would be an unfortunate and uncalled-for restriction of the grant of authority intended by the Constitution. Until recently Congress had not seen fit to exercise its power in this direction, and for this reason the instance seems novel, but in the circumstances, this is no argument against its existence.

In respect to the inquiry as to what constitutes interstate commerce, and particularly to the question whether it is limited to the case of traffic in and the

transportation of commodities for the purposes of such traffic, reference may be profitably had to some other cases decided by the Supreme Court. We have already indicated our view that in *Gibbons* v. *Ogden* the subjects which were included in the power granted Congress was not thought to be so restricted. In the case of *Gloucester Ferry Co.* v. *Pennsylvania* it was held that the transportation of passengers as well as freight from one State to another by a ferry was interstate commerce. In the case of *Covington, etc., Bridge Co.* v. *Kentucky* it was held that the company's bridge across the Ohio was an instrumentality of interstate commerce, because it furnished the means of intercourse between the people of two States, and the taking of toll for the passage of persons, as well as of freight, was interstate business. In that case it was remarked by Mr. Justice Brown in delivering the opinion of the court, referring to the Gloucester Ferry case, "If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the State line regardless of the distance from which it comes or to which it is bound; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or travel in person from Cincinnati to Covington." And again, "commerce was defined in *Gibbons* v. *Ogden* (9 Wheat., 1–189) to be 'intercourse,' and the thousands of people who daily pass and repass over the bridge may as truly be said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." In that case the "bridge" was a mere instrumentality. It was the use of it for the purpose of intercourse between the people of the two

States which impressed upon the structure the character of an instrumentality or agency of such intercourse. Indeed, it is impossible to conceive that an instrument by which business is transacted can have any commercial character otherwise than as is reflected upon it by the business itself. Whether it be a ferry, a bridge, a railroad, or a telegraph line, the agency has no intrinsic quality which brings it within the purview of the commerce clause of the Constitution. It acquires that quality from its appropriation to the uses of interstate commerce. In *Telegraph Co.* v. *Texas* (105 U. S., 460) it was decided that intercourse by the telegraph between the States is interstate commerce, and that a tax on messages is a tax on the commerce itself. And this doctrine has been reaffirmed in several subsequent cases. So it was held in the *Passenger cases* (7 How., 283) and *Henderson* v. *The Mayor* (92 U. S., 259) that the importation of passengers into the United States was commerce with foreign nations, and so within the control of Congress. And so it is not doubted that Congress may legislate for the exclusion of passengers who from diseased or other conditions would be an offense to the welfare of the public. And in *Crandall* v. *Nevada* (6 Wall., 35), the doctrine of the cases last cited was applied to the transportation of passengers by a railroad from one State into another. These cases seem to us altogether inconsistent with the idea that interstate commerce is limited to traffic in commodities or merchandise. In the telegraph cases, for instance, it is nowhere suggested that the messages which would be exempt from State taxation should be such only as relate to traffic. In the passenger cases there is no element of barter of commodities or merchandise of any sort.

In the present case it would seem that the enterprise in which these parties are alleged to have been engaged

was one which involved business intercourse between parties in different States, and that by means of the transportation of the instruments with which it was carried on from one State into another. And it is not material that transportation was done by a private individual rather than by a corporation. The slips which represented the interest of the buyer of the chance, its contents being understood by all the parties to the transaction, was a ticket in the lottery. That the game was a lottery has several times been decided in the State courts. *People* v. *Elliot*, 74 Mich., 264; *Commonwealth* v. *Sullivan*, 146 Mass., 142; *Wilkinson* v. *Gill*, 74 N. Y., 63; *State* v. *Kansas Mercantile Association*, 45 Kans., 351.

The inclination of our judgment is to hold that the statute in question is not invalid, and that the present case is covered by it. But conceding that there may be some doubt of the correctness of our conclusion that the statute is within the power of Congress, the doubt we have is not sufficient to justify us in holding it to be invalid, seeing that in this class of cases our judgment is made by law subject to the supervision of the Supreme Court.

It is further objected that the indictment is defective in not showing that a lottery was being conducted. No objection was made on this account either before or at the trial. We think it appears with reasonable certainty that such a transaction was being carried on, although the averments are not, perhaps, so direct and specific as would have been necessary to encounter a prompt objection on that account.

The indictment is much more full and specific than that in *Com.* v. *Sullivan* (*supra*), which the court said was "well enough."

It is also urged that the evidence did not justify the verdict in that there was no proof of conspiracy to do

what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient. And we think the evidence was such as to warrant the verdict.

Many objections were made upon the trial to the rulings of the court in admitting evidence. More than one hundred and fifty errors are assigned, a large proportion of which relate to these rulings. Many of the objections related to similar matters, and there was needless and tiresome repetition.

We have, however, gone through the bill of exceptions and have found no instance in which any ground or reason whatever was assigned on which the objections were made. The reason for the rule requiring counsel to state the grounds of their objections is augmented where the frequency of objections may lead the court to the conclusion that the counsel is content to take his chances in finding the reasons afterwards. The rule itself is settled by a great number of decided cases, many of which are collected in 8 Encyl. of Pl. & Pract., at page 163; and see especially as indicating the practice in the courts of the United States, *Camden* v. *Doremus*, 3 How., 315; *Tabor* v. *Commercial National Bank of Cleveland*, 62 Fed., 383.

General exceptions were taken to the charge of the court to the jury. Some of them have been disposed of by what we have said in dealing with the topics already discussed. We have examined the instructions of the court, as well as the requests of counsel for the respondents to charge the jury, and think the case was

fairly submitted to the jury, and that all proper instructions were given them. In view of the multitudinous exceptions and assignments of error under this head, we must content ourselves with refraining from a separate discussion of each.

The judgment will be affirmed.

B.

MR. JEFFERSON'S VIEWS ON LOTTERIES.

[After some discussion of the element of chance in life Mr. Jefferson says:]

There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases. Money is wanting for a useful undertaking as a school, etc., for which a direct tax would be disapproved. It is raised therefore by a lottery, wherein the tax is laid on the willing only, that is to say, on those who can risk the price of a ticket without sensible injury for the possibility of a higher prize. An article of property, insusceptible of division at all, or not without great diminution of its worth, is sometimes of so large value as that no purchaser can be found while the owner owes debts, has no other means of payment, and his creditors no other chance of obtaining it but by its sale at a full and fair price. The lottery is here a salutary instrument for disposing of it, where many run small risks for the chance of obtaining a high prize.

In this way the great estate of the late Colonel Byrd (in 1756) was made competent to pay his debts, which, had the whole been brought into the market at once, would have overdone the demand, would have sold at half or quarter the value, and sacrificed the creditors, half or three-fourths of whom would have lost their debts. This method of selling was formerly very much resorted to until it was thought to nourish too much a spirit of hazard. The legislature were therefore induced not to suppress it altogether, but to take it under their own special regulation. This they did for the first time by their act of 1769, c. 17, before which time every person exercised the right freely, and since which time it is made unlawful but when approved and authorized by a special act of the legislature.

Since then this right of sale by way of lottery has been exercised only under the jurisdiction of the legislature. Let us examine the purposes for which they have allowed it in practice, not looking beyond the date of our independence.

1. It was for a long time an item of the standing revenue of the State.

1813, c. 1, sec. 3. An act imposing taxes for the support of Government; and c. 2, sec. 10.

1814, Dec., c. 1, sec. 3. 1814, Feb., c. 1, sec. 3. 1818, c. 1, sec. 1. 1819, c. 1. 1820, c. 1.

This, then, is a declaration by the nation, that an act was not immoral, of which they were in the habitual use themselves as a part of the regular means of supporting the Government; the tax on the vendor of tickets was their share of the profits, and if their share was innocent, his could not be criminal.

2. It has been abundantly permitted to raise money by lottery for the purposes of schools; and in this, as in many other cases, the lottery has been permitted to

retain a part of the money (generally from ten to fifteen per cent) for the use to which the lottery has been applied. So that while the adventurers paid one hundred dollars for tickets, they received back eighty-five or ninety dollars only in the form of prizes, the remaining ten or fifteen being the tax levied on them, with their own consent. Examples are:

1784. c. 34. Authorizing the city of Williamsburg to raise 2,000 pounds for a grammar school.

1789. c. 68. For Randolph Academy, 1,000 pounds.

1789. c. 73. For Fauquier Academy, 500 pounds.

c. 74. For the Fredericksburg Academy, 4,000 pounds.

1790. c. 46. For the Transylvanian Seminary, 500 pounds.

For the Southampton Academy, 300 pounds.

1796. c. 82. For the New London Academy.

1803. c. 49. For the Fredericksburg Charity School.

c. 50. For finishing the Strasburg Seminary.

c. 58. For William and Mary College.

c. 62. For the Bannister Academy.

c. 79. For the Belfield Academy.

c. 82. For the Petersburg Academy.

1804. c. 40. For the Hotsprings Seminary.

c. 76. For the Stevensburg Academy.

c. 100. For William and Mary College.

1805. c. 24. For the Rumford Academy.

1812. c. 10. For the Literary Fund. To sell the privilege for $30,000 annually, for seven years.

1816. c. 80. For Norfolk Academy, $12,000.
Norfolk Female Society, $2,000.
Lancastrian School, $6,000.

3. The next object of lotteries has been rivers:

1790. c. 46. For a bridge between Gosport and Portsmouth, 400 pounds.
1796. c. 83. For clearing Roanoke River.
1804. c. 62. For clearing Quantico Creek.
1805. c. 42. For a toll bridge over Cheat River.
1816. c. 49. For the Dismal Swamp, $50,000.

4. For roads:

1790. c. 46. For a road to Warminster, 200 pounds. For cutting a road from Rockfish gap to Scott's and Nicholas's landing, 400 pounds.
1796. c. 85. To repair certain roads.
1803. c. 60. For improving roads to Snigger's and Ashby's gaps.
c. 61. For opening a road to Brock's gap.
c. 65. For opening a road from the town of Monroe to Sweet Springs and Lewisburg.
c. 71. For improving the road to Brock's Gap.
1805. c. 5. For improving the road to Clarksburg.
c. 26. For opening a road from Monongalia Glades to Fishing Creek.
1813. c. 44. For opening a road from Thornton's Gap.

5. Lotteries for the benefit of counties:

1796. c. 78. To authorize a lottery in the county of Shenandoah.
c. 84. To authorize a lottery in the county of Gloucester.

6. Lotteries for the benefit of towns:

1782. c. 31. Richmond, for a bridge over Shockoe; amount not limited.

1789. c. 75. Alexandria, to pave its streets, 1,500 pounds.

1790. c. 46. Alexandria, to pave its streets, 5,000 pounds.

1796. c. 79. Norfolk, one or more lotteries authorized.

c. 81. Petersburg, a lottery authorized.

1803. c. 12. Woodstock, a lottery authorized.

c. 48. Fredericksburg, for improving its main street.

c. 73. Harrisonburg, for improving its streets.

7. Lotteries for religious congregations:

1785. c. 111. Completing a church in Winchester.

For rebuilding a church in the parish of Elizabeth River.

1791. c. 69. For the benefit of the Episcopal Society.

1790. c 46. For building a church in Warminster, 200 pounds.

in Halifax, 200 pounds.

in Alexandria, 500 pounds.

in Petersburg, 750 pounds.

in Shepherdstown, 250 pounds.

8. Lotteries for private societies:

1790. c. 46. For the Amicable Society in Richmond, 1,000 pounds.

1791. c. 70. For building a Free Masons' hall in Charlotte, 750 pounds.

9. Lotteries for the benefit of private individuals (to raise money for them):

1796. c. 80. For the sufferers by fire in the town of Lexington.

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1781. c. 6. For completing titles under Byrd's lottery.

1790. c. 46. To erect a paper mill in Staunton, 300 pounds.

To raise 2,000 pounds for Nathaniel Twining.

1791. c. 73. To raise 4,000 pounds for William Tatham, to enable him to complete his geographical work.

To enable ——— to complete a literary work.

O